IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,
Respondents.

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Court of Appeals (A. 151) is reported at 393 Fed.2d 49. The decision and order of the Board (A. 125) are reported at 145 N.L.R.B. 1097.[1]

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e). The decree of the Court of Appeals was entered on April 16, 1968. The petition for a writ of certiorari was docketed in this Court on July 6, 1968.

[1] This case was previously before this Court with respect to the issue of the right of the union to intervene in the proceedings before the Court of Appeals. The opinion on that issue is reported at 382 U.S. 205. That issue is not involved here.

rights. Such a view cannot be sustained. It is established that §8(b)(1)(A) protects union members against union coercion as well as it protects nonmembers. *Radio Officers v. Labor Board*, 347 U.S. 17; *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, A.F.L.-C.I.O.*, 391 U.S. 418. Such a waiver theory would be particularly inappropriate where, as here, the membership of the employee in the union is colored by the fact that he is compelled under the applicable collective bargaining agreement to pay dues or the equivalent of dues to the union whether or not he joins.

The violation here is apparent upon the face of the statute. That §8(b)(1)(A) may properly be applied to union fines and even expulsion is established by the *Marine Workers* case as well as Board decisions such as *Local 138, International Union of Operating Engineers (Charles S. Skura)*, 148 N.L.R.B. 679. The statute should be so applied here.

Such a result would not be inconsistent with the *Allis-Chalmers* decision. In its broadest sense the majority opinion in the *Allis-Chalmers* case upheld the union fines only because they were seen to aid and further the proper collective bargaining function of the union there. The approach of the *Allis-Chalmers* majority establishes the prime importance of collective bargaining as the basic policy of the Act. It thus follows that union fines of the type here must be condemned, since they have the effect of weakening and bypassing the collective bargaining process. The fines here must be found to constitute unfair labor practices.

A question has been raised as to the timely filing of the petition for writ of certiorari. The applicable statute, 28 U.S.C. 2101(c), requires that the petition be filed within

ninety days "after the entry of [the] judgment or decree". The decree here was entered by the Court of Appeals on April 16, 1968, and the petition was filed within ninety days thereafter on July 6, 1968. A prior order of the Court of Appeals on March 5, 1968, was by its terms tentative and contemplated the later entry of the decree. This prior order did not constitute the entry of a judgment or decree within the meaning of the statute. The petition was timely.

ARGUMENT

I. The Union Fines Here Constitute an Unfair Labor Practice Under Section 8(b)(1)(A) of the Act.

The rights stated in §7 of the National Labor Relations Act are the core of the Act. Employees are guaranteed certain rights to engage in concerted activities and, most important, are also guaranteed "the right to refrain from any or all of such activities."

Neither the Board nor the Court below questioned that the employees here, by refusing to engage in the union production limitation, were exercising their protected rights under §7. This issue had been settled by an earlier Board decision, *Printz Leather Co., Inc.*, 94 N.L.R.B. 1312. In that case an unfair labor practice was found where employees were coerced in the enforcement of a union production ceiling rule. The illegal restraint and coercion in that case did not take the form of union fines, but the identical §7 right was involved.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in §7. There can be no question that union discipline is coercive in fact. Cf. concurring opinion of Mr. Justice White in

STATUTES INVOLVED

National Labor Relations Act (61 Stat. 136, 29 U.S.C. §151 et seq.)

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .
>
> * * *
>
> Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .
>
> * * *

Other relevant portions of the National Labor Relations Act are set forth in the Appendix hereto. The portion of the argument below relating to the jurisdictional issue sets forth the relevant provision of the Judicial Code.

QUESTIONS PRESENTED

1. Whether a union restrains or coerces an employee in the exercise of a right guaranteed by §7 of the National Labor Relations Act, in violation of §8(b)(1)(A), when the union fines the employee, and attempts to collect such fine by court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the union.

2. Whether the petition for writ of certiorari was timely filed.

STATEMENT OF THE CASE

The facts are fully set forth in the decision of the Board. (A. 125) The essential facts are few and undisputed.

The union[1] has been the collective bargaining representative of the employees of Wisconsin Motor Corporation in Milwaukee, Wisconsin since 1937. Under the collective bargaining agreement in force at the time this dispute arose, employees of the company were required either to belong to the union or to pay the union a service fee equivalent to dues. (A. 126)

For a number of years the union has had in effect a rule which required union members to limit their reporting of production so that their earnings of incentive pay would not exceed certain specified ceilings. The ceilings were the subject of collective bargaining between the company and the union from time to time. Although the company knew of the existence of the ceilings and attempted to have them raised or eliminated, the company did not recognize the ceilings as a limit on the amount which an employee could earn. The ceilings have never been incorporated in the collective bargaining contract as a term of employment. (A. 128) If an employee chose to ignore the ceilings and produce and report work in excess of the ceilings, the company paid the employee for his actual production without regard to the ceilings.[2] (A. 127)

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[1] Local 283 of the respondent International Union, UAW-AFL-CIO.

[2] The practical effect of the ceiling rule was elaborated in the opinion of Board member Leedom:

> "The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and

The union enforced the ceiling rule by imposing fines on members. Ordinarily the fines were limited to one dollar for each violation. However, persistent violations subjected an employee to a charge of conduct unbecoming a union member with consequent exposure to fines up to $100 for each offense. (A. 127) The petitioners here were charged with conduct unbecoming a union member for having violated the ceiling rule, and following union trials, fines ranging from $50 to $100 were imposed. The union has instituted civil actions in the Wisconsin courts for the collection of such fines, which actions are still pending. (A. 129)

The petitioners here filed charges with the National Labor Relations Board alleging that the union action in imposing and attempting to collect fines for violation of the ceiling rule restrained and coerced the petitioners in the exercise of their right under Section 7 of the National Labor Relations Act to refrain from concerted union activities. A complaint was issued by the General Counsel of the Board alleging that such action by the union constituted an unfair labor practice under Section 8(b)(1)(A) of the Act. The Board (with member Jenkins concurring and member Leedom dissenting) dismissed such complaint, finding that no unfair labor practices had been committed. (A. 137)

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the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in 5 hours, and that the employees have read books, played cards, and talked in the remaining time."

* * *

In spite of this, the employees produce more than the production ceilings allow. The excess is 'banked' for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings." 145 NLRB 1097 at 1106 (A. 140)

Pursuant to Section 10(f) of the Act, the petitioners here petitioned the Seventh Circuit Court of Appeals for review of the decision and order of the Board. Consideration of the merits of the petition was delayed in the Court of Appeals pending the review by this Court of the right of the union to intervene as a party in the proceedings before the Court of Appeals. Thereafter proceedings were further deferred pending the consideration by this Court of related issues which were ultimately resolved in the case of *National Labor Relations Board v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175.[3] Following that decision the Court of Appeals renewed consideration of the petition for review in the present case and ultimately denied the petition by a divided court with senior judge Knoch dissenting. (A. 151)

The opinion of the Court of Appeals (A. 151) was issued March 5, 1968, together with an order calling for the subsequent entry of a decree (A. 162). In due course a proposed decree was prepared by the General Counsel for the Board and forwarded to the Court and the parties April 3, 1968 (A. 163). The decree of the Court of Appeals was entered April 16, 1968 (A. 166, 167). The petition for certiorari was filed and docketed in this Court July 6, 1968 and the order allowing certiorari was filed October 14, 1968 (A. 169).

SUMMARY OF ARGUMENT

The decision below upholds the validity of a coercive union device for restricting the productive output of an individual employee. Although the individual is willing to work in accordance with his abilities and the employer has agreed to pay him for whatever work he produces, the

[3] Hereinafter called the *Allis-Chalmers* case.

union fine effectively inhibits the employee from earning the money the employer is willing to pay.

It is an essential foundation of national labor policy that issues of wages, work loads and productive output should be resolved through the collective bargaining process. This concept is the bedrock of the Act. Yet through the device of coercive fines, the union here effectively bypasses the collective bargaining process and enforces a production and wage limitation which it was unable to obtain in negotiations with the employer.

It is unnecessary to indulge in a detailed examination of the workings of the union rule or the role of the company in its historical development. The essential fact remains, as conceded by the Respondents and found by the Board, that the union ceiling is not imposed by the collective bargaining agreement. An employee who chooses to disregard the union rule and to report all production for immediate payment, will be fully paid by the company despite the fact that such payment may exceed the union's ceilings. It is the union rule and the coercive enforcement thereof, not the company nor the collective bargaining agreement, which limit an employee in the amount he can earn from his work.

This basic fact is also the short answer to the philosophical objections of the union to incentive pay plans and potentially excessive work standards. Under the Act the union has been granted an extraordinary array of privileges to assist it in enforcing these objections. The union is privileged to bargain for the wages, hours and working conditions of the Petitioners, whether they like it or not, by virtue of the exclusive representation concept of §9 of the Act. The union is privileged to negotiate a straight hourly pay system, to negotiate work standards

and to negotiate upper limits on incentive pay; the Petitioners would be bound by any such agreement. Finally, the union is privileged to negotiate an agreement which requires every employee to pay dues to the union or an equivalent service fee.

But all this, says the union, is not enough coercive power. Instead of accomplishing its objectives through collective bargaining as the Act permits and encourages, the union by-passes the collective bargaining process and attempts through coercive fines to restrain its members from earning the wages which the company is obligated to pay under the collective bargaining agreement negotiated by the union itself. The privileges of coercion established by the Act do not extend so far.

Section 7 of the Act guarantees to each employee the right to refrain from any union concerted activity. The employees here were exercising their §7 rights when they refrained from the union production limitation and earned the wages provided under the applicable collective bargaining agreement. *Printz Leather Co., Inc.*, 94 N.L.R.B. 1312.

Under §8(b)(1)(A) of the Act a union commits an unfair labor practice where it restrains and coerces an employee in the exercise of §7 rights. The union fines here constitute such a coercion within the meaning of §8(b)(1)(A). Nor are the fines exempt under the proviso to that section. The proviso relates only to union rules affecting the acquisition of union membership and the retention of union membership. The proviso does not extend to coercive union fines in derogation of §7 rights.

In two recent cases this court has considered the validity of union discipline under §8(b)(1)(A) of the Act. In both cases the decisions departed from the literal language of the statute because of special policy considerations. In *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, the literal language of §8(b)(1)(A) was held inapplicable to union fines imposed against employees who worked during a strike because of the special policy considerations favoring the full protection of the union strike power. In *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, A.F.L.-C.I.O.*, 391 U.S. 418, a violation of §8(b)(1)(A) was found, despite the literal language of the proviso, where a union expelled a member for having filed charges with the Board, again because of a special policy consideration — here the need to preserve free access to the processes of the Board.

The special policy considerations involved in those cases are not present here. The policies involved here dictate that the statute should be applied in accordance with its terms.

The Court of Appeals considered that the *Allis-Chalmers* decision required a finding that the union fines here were not unfair labor practices. While the result in the *Allis-Chalmers* case may support such a view, the reasoning of the majority opinion in that case suggests the opposite conclusion. The essential reason for upholding the union fines there was that the fines in that case were found to be in aid of the proper collective bargaining function of the union which the Act seeks to foster and protect. Here, by contrast, the union fines bypass, weaken and diminish this collective bargaining function and thus offend, rather than promote, the policies which the *Allis-Chalmers* decision found controlling.

The *Allis-Chalmers* decision is distinguishable from the present case in two important respects. Most important is the difference in union goals involved. The union goal in the *Allis-Chalmers* case, the maintenance of an effective economic strike, was a goal which commands the highest protection under the Act. By contrast, the union goal here, a production restriction commonly known as featherbedding, is not even a protected activity under the Act.

A second important point of distinction is the question of the alternatives available to the union. In the *Allis-Chalmers* case the union fines were the alternative to the violence which has commonly erupted in similar situations where a union and its members sought to prevent other employees from working during a strike. Here the situation is entirely different. The union can accomplish its purposes through the usual collective bargaining processes under the Act. The Act seeks to foster and encourage resolution of such questions through collective bargaining. The enforcement of the union production limitations through coercive union fines bypasses the normal collective bargaining process and thus is inimical to the policy of the Act.

The *Allis-Chalmers* decision was rendered by a sharply divided court. Its validity is doubtful. It can be justified, if at all, only by reference to the special policy considerations involved in the strike situation. There is no warrant for extending the *Allis-Chalmers* principle to cases where those policies are not involved.

The *Allis-Chalmers* principle could appropriately be extended to this case only by accepting the view that an employee who joins a union thereby waives his statutory protection against union coercion in the exercise of his §7

the *Allis-Chalmers* case, 388 U.S. 175, 197-198. And absent the special policy considerations involved in the *Allis-Chalmers* case, a union fine violates §8(b)(1)(A). Cf. dissenting opinion of Mr. Justice Black in the *Allis-Chalmers* case, 388 U.S. 175, 199-217.

The proviso to §8(b)(1)(A) disclaims any impairment of the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. But the imposition and attempted enforcement of the fine here go well beyond any question of acquisition or retention of membership in the union. Rather than seeking to enforce the fine by expulsion from the organization, the union is attempting to collect the fine through court procedures. The Wisconsin courts have held that union fines may be collected in this manner. *U.A.W. v. Woychik,* 5 Wis. 2d 528, 93 N.W. 2d 336. Moreover, they have held that fines can be so collected regardless of any contrary state policy. *Local 248, U.A.W.-A.F.L.-C.I.O. v. Natzke,* 36 Wis. 2d 237, 153 N.W. 2d 602.

The Board itself has held that union fines constitute unfair labor practices under §8(b)(1)(A) where the fines are imposed upon an employee for seeking recourse to the processes of the Board. *Local 138, International Union of Operating Engineers,* 148 N.L.R.B. 679; *Roberts v. N.L.R.B.,* 350 Fed. 2d; *Wood, Wire & Metal Lathers' International Union, Local No. 238,* 156 N.L.R.B. 997. Moreover, the Board has adhered to this view even since the *Allis-Chalmers* decision. *American Bakery & Confectionery Workers Local Union 300,* 167 N.L.R.B. No. 76; 66 L.R.R.M. 1107.

The violation is apparent upon the face of the statute. Since there are no special and overwhelming policy considerations of equal weight to those found controlling in

the *Allis-Chalmers* decision, the union fines here are banned by the Act.

This Court has had two recent opportunities to consider the validity of union discipline under §8(b)(1)(A) of the Act. In the *Allis-Chalmers* decision it was determined that a fine imposed upon a member for having crossed a picket line and worked during a strike did not violate §8(b)(1)(A). Subsequently in *N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers of America, A.F.L.-C.I.O.*, 391 U.S. 418, it was held that a union violated §8(b)(1)(A) by expelling a member from membership because the member had filed charges with the Board in a prior matter without first exhausting his internal union remedies.

It is submitted that in both these decisions this Court relied upon special policy considerations as the basis for a departure from the literal application of the statute. In the *Marine Workers* case, expulsion from the union was found to violate §8(b)(1)(A) despite the fact that such an expulsion would appear to be immunized by the clear language of the proviso to that section. The special policy reason justifying this departure was the overriding need to assure free access to the remedial powers of the Board.

In the *Allis-Chalmers* case, on the other hand, a union fine imposed upon a member for working during a strike was held not to violate §8(b)(1)(A) despite the fact that such a fine is covered by the explicit language of the prohibition and is outside the scope of the proviso. In that case the special policy considerations which were deemed to require this departure from the literal statutory language were the fears of imposing any limitations upon the ultimate weapon which makes a union an effective collec-

tive bargaining agent — the power to maintain an effective strike.[4]

Here we find no such overriding policy considerations. In this context the cross-currents of argument must be resolved in favor of the language of the statute itself. As was said in *Local 1976, United Brotherhood of Carpenters & Joiners of America, A.F.L. v. N.L.R.B.*, 357 U.S. 93, 100:

> "The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this court's .... Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the court must extract the meaning most appropriate."

II. The *Allis-Chalmers* Decision Does Not Immunize the Union Fines Here.

The majority opinion in *Allis-Chalmers* emphasized the importance of maintaining the union strike power and expressed concern that by impairing the usefulness of labor's cherished strike weapon there would be a limitation upon the powers necessary to the discharge of the union statutory role as exclusive collective bargaining

[4] There can be no question that this was the central rationale for the *Allis-Chalmers* decision. The decision was so described in the *Marine Workers* case, 391 U.S. 418, 423. As stated by Mr. Justice Black in his dissent in the *Allis-Chalmers* case, "The real reason for the court's decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strikebreakers and to enforce those fines in court." 388 U.S. 175, 201.

agent. 388 U.S. 175, 181, 183. That same policy favoring collective bargaining requires a different result here. For union fines which are imposed for exceeding a union production limitation directly impair the collective bargaining process.

There are two critical distinctions between the present case and the *Allis-Chalmers* case. The first relates to the goal of the union disciplinary action. The second relates to the alternative methods available to the union to achieve its goal. As will be more fully developed below these distinctions lead inevitably to the conclusion that the union fines here violate the Act.

A. The Union Goal Here is Not Favored by the Law.

In the *Allis-Chalmers* case the goal of the union disciplinary activity was the preservation of an effective strike power. The right to strike is a privilege which is guaranteed the fullest protection under the Act. This right is at the very core of federal labor policy and is granted full and explicit protection under §13 of the Act:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

How different is the goal of the union action here. As noted above, the ceilings reduce and slow down production, an employee can reach the production ceiling in five hours and the employees have read books, played cards and talked in the remaining time. (See Note 2, pp. 3-4, *supra.*)

Despite this limited effort the employees consistently earn very close to the ceiling rate, their average earned rate being approximately near the ceiling. (T. 250, A. 21; T. 369, 526) Moreover, when the ceilings are raised the employees very quickly are able to raise their production to the new rate. (T. 526) Nevertheless the ceilings permit good earnings which compare favorably with other wages in the area. (T. 249-250, A. 20-21). The union itself concedes that the original purpose of the ceiling was to "keep as many fellows working as we possibly could." (T. 553, A.45) The only reasonable conclusion from this evidence is that the ceilings constitute pure and simple featherbedding designed to provide work for more employees than the job requires.

While this type of practice may be a common historical union goal it has never been one favored by the law. Far from commanding the explicit protection granted to the strike power, such featherbedding practices lie on the border between unprotected concerted activities and outright illegality.

In the consideration of the Taft-Hartley bill, the form of the bill as it passed the House would have outlawed various defined featherbedding practices including an attempt to require an employer "to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services." Leg. Hist. of the Labor Management Relations Act, 1947, Vol. I, 170. Although this provision of the House bill was not incorporated into the final legislation, the rejection was based upon practical difficulties of application rather than any dissent from the basic principle. As Senator Taft said:

> "The Senate conferees, while not approving of feather-bedding practices, felt that it was imprac-

> ticable to give to a board or a court the power to say that so many men are all right, and so many men are too many . . . We thought that probably we had better wait and see what happens, in any event, even though we are in favor of prohibiting all feather-bedding practices." Leg. Hist. of the Labor Management Relations Act, 1947, Vol. II, 1535.[5]

Although the Taft-Hartley Act stopped short of branding union production limitations as illegal in themselves, neither are such activities protected by the Act. For example, in *General Electric Co.*, 155 NLRB 208, the Board held that an employer did not commit an unfair labor practice when it discharged an employee for attempting to induce other employees to engage in a deliberate restriction of production under an incentive pay system. Such activity by the employee was found not to be protected under the Act.

Numerous other cases have established that the Act does not protect a variety of union techniques for slowing down or interfering with production. Representative decisions are *Automobile Workers, Local 232 v. WERB*, 336 U.S. 245; *NLRB v. Montgomery Ward & Co.*, 157 F. 2d 486; *Elk Lumber Co.*, 91 NLRB 333; *Celotex Corp.*, 146 NLRB 48; *Raleigh Water Heater Manufacturing Co.*, 136 NLRB 76. Moreover, the Board has specifically recognized that an employee has the protected right under the Act to refrain from such union production restrictions. *Printz Leather Company, Inc.*, 94 NLRB 1312.

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[5] Further evidence of the legislative disapproval of featherbedding practices is found in the Lea Act, 47 U.S.C. 506, 60 Stat. 90. The Lea Act broadly prohibits featherbedding practices in the broadcasting field. These provisions were upheld against attacks as to their constitutionality in *U.S. v. Petrillo*, 332 U.S. 1.

The sharp distinction between the union goals involved in the *Allis-Chalmers* case and the goals involved here is highlighted in the article by Professor Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, one of the principal authorities relied upon by Mr. Justice Brennan in his *Allis-Chalmers* opinion. That article reviews the existing precedents with regard to various reasons for union discipline and points out that while discipline for strike-breaking is universally recognized, discipline relating to production restrictions has not been enforced by the courts. See 64 Harv. L. Rev. 1049, 1065. An observation of great force here can be found in the case of *Dragwa v. Federal Labor Union No. 23070*, 41 Atl. 2d 32, 34:

> "... if a voluntary trade organization should ordain that a member who in the pursuit of his occupation exceeds the average level of industry and production of his fellow workers, shall be expelled for conduct unbecoming a member, I would experience no hesitancy in invalidating such a regulation as positively repugnant and inimical to our traditional public policy. The freedom of an individual to excel in any field of lawful activity is one of our national ideals and a substantial right which the individual may not himself barter away."

In the *Allis-Chalmers* case this Court permitted a union fine which it deemed to be in furtherance of the proper role of the union as a collective bargaining agent and the exercise of the traditional union strike power. The principle of that case must not be extended to permit fines in furtherance of other union goals which do not further the purposes of the Act, and in fact do not even command the protection of the Act.

B. The Union Fines Here Are Inimical to the Collective Bargaining Process.

In the context of the *Allis-Chalmers* case, the union had no practical legal alternative for the attainment of its goal. The union sought to prevent employees from working during a strike. All too often in the past, violence has erupted as striking unions attempted to achieve such an objective.[6]

By contrast here, the union has available a perfectly lawful and effective alternative. If it wishes to impose production limitations, earnings ceilings, or any similar term or condition of employment, it can and must achieve this purpose through the usual collective bargaining process.

One of the fundamental purposes of the Act is to encourage the use of collective bargaining to resolve such questions. By instead unilaterally attempting to regulate such a subject by fines upon its members, the union weakens and destroys the institution of collective bargaining which is the heart of the Act.

Section 1 of the Act states this policy in unmistakable terms:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ."

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[6] Petitioners do not mean to suggest that a union has any right to prevent employees from working during a strike. The Act has been uniformly interpreted to the contrary. But assuming from experience that a union will nevertheless attempt to obtain this objective, even by violence where necessary, the fines as found in the *Allis-Chalmers* case appear to be a more acceptable alternative.

Here the union has been unsuccessful in attempting to obtain its goals through the usual and proper collective bargaining processes. It nevertheless seeks to gain the same objective by imposing coercive fines upon its members. If such a power is sustained, the policy of the Act to encourage collective bargaining will be thwarted. The union will have no need or incentive to negotiate in good faith with an employer. Rather, through coercive union fines, it will impose its own conditions of employment whether or not they are accepted by the employer in collective bargaining.

The union claims that it is pursuing a legitimate objective which has been a union goal for many years. The union points to its long standing opposition to any form of incentive pay plan.[7] Such claims are beside the point.

If the union seeks to control incentive pay plans, the Act requires that this objective be attained through collective bargaining. A recent case which exhaustively reviewed this fundamental principle was *Associated Home Builders of the Greater East Bay v. N.L.R.B.*, 352 Fed. 2d 745, remanding to the Board for further consideration the question of the legality of a union fine imposed to enforce a production limitation adopted by the union without first bargaining with the employer. Coercion against employees to restrict incentive pay violates the Act. *N.L.R.B. v. Brotherhood of Painters*, 242 Fed. 2d 477, holding that a union violated §8(b)(1)(A) by causing the discharge of an employee for having refused to abide by union policies prohibiting incentive pay.

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[7]Even granting this history, the legitimacy of the union objective is doubtful where the effect of the union action is to promote extreme featherbedding practices such as are disclosed by the record here.

The union here has negotiated a contract which calls for eight hours work in a day and imposes no limit upon the amount that an incentive worker may earn. The petitioners here sought to abide by that contract, to work the regular work day and not artificially curtail production, and to earn the wages permitted by the contract. The union seeks to prevent them from doing so by imposing coercive fines. Unlike the fines in the *Allis-Chalmers* case, which were found to be in futherance of the exercise of the collective bargaining function of the union, the fines here bypass the collective bargaining process and weaken it. As such they cannot be tolerated under the Act.

III. The Principle of the *Allis-Chalmers* Decision Should Not be Extended.

As pointed out in the very forceful dissent of Mr. Justice Black in the *Allis-Chalmers* case, the decision there was contrary to the express language of the Act, its legislative history and its policies. The validity of the decision is doubtful. If it is to be sustained at all, it must be limited to its particular facts and not further extended.

The fundamental error of the *Allis-Chalmers* decision is its reliance upon the unsupported opinion of a text-writer that the power to fine employees who work during a strike is essential to the effective discharge of the union collective bargaining function. Quite obviously, Congress did not agree with this conclusion. If Congress believed that every employee should be required to honor any strike that was approved by majority vote, Congress could have so provided. But, of course, the Act provides precisely to the contrary and instead protects the individual choice of each employee to decide free from coercion whether to engage in or refrain from a strike or other concerted activity.

The fundamental concern of Congress as reflected in §7 of the Act was to protect the individual from coercion by either his employer or his labor organization. Extensive legislative hearings had conclusively demonstrated the need for such protection. The uncoereed right of the individual to engage in or refrain from concerted activities is the ultimate check and balance which restrains arbitrary action by an employer, by a labor organization or by a majority of employees in derogation of the rights of the minority. This is precisely the check and balance which Congress sought to achieve in the Taft-Hartley Act.

The majority opinion in the *Allis-Chalmers* case builds upon the assumption that unions need the power to fine their members in order to achieve their proper objectives under the law. Such an assumed need simply cannot be documented by the history of labor relations in this country. Unions have grown and flourished, have commanded the uncoerced allegiance of their members and have discharged their collective bargaining functions with great vigor, all without the need for imposing court collectible fines upon their members. Prior to the *Allis-Chalmers* decision there does not appear to be a single reported court case where a union had been upheld in the collection of a fine of the type involved there.

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[8] The majority opinion in the *Allis-Chalmers* case seems preoccupied with the alleged needs of "weak" unions. However, it offers no explanation as to why a "weak" union should be entitled to any support from this Court. The Act would not support such a view. A "weak" union is weak for the simple reason that it is unable to win the allegiance of the employees. Under the Act it is the employees, not the union whose wishes are paramount. The union can become and remain a collective bargaining agent under the Act only through the free choice of the employees. The Act specifically forbids a union from attempting to increase its strength through coercion of the employees whom the union is supposed to serve.

It would seem appropriate for this court to reexamine the assumptions underlying the majority opinion in the *Allis-Chalmers* case and explicitly overrule that decision. But even if the *Allis-Chalmers* principle is accepted as applied to the special problem faced by unions when members work during a strike, there is clearly no warrant for extending that principle to the present situation. Here there can be no claim that the union needs the fine power to achieve its goals, since the goals are ones that can and must be achieved through the give and take of the collective bargaining process.

The only theory which would justify the extension of the *Allis-Chalmers* principle to this case would be a theory that an employee who voluntarily joins a labor organization waives the protection of the Act and submits himself to any and all discipline which a union may choose to impose. Such a theory cannot be sustained.

Since the case of *Radio Officers v. Labor Board,* 347 U.S. 17, it has been established that the protection of the Act extends not only to the choice of joining or not joining a union, but also permits employees to be "good, bad or indifferent members". 347 U.S. at 40. The legislative history reviewed in the dissenting opinion of Mr. Justice Black in the *Allis-Chalmers* case confirms the express intention of the sponsors of §8(b)(1)(A) to protect union members against coercion by their leadership. 388 U.S. 175, 209-210. Any such waiver theory would obviously be inconsistent with the decisions of the Board and this Court holding that union fines or expulsion imposed upon a member for exercising rights under §7 constitute a violation of §8(b)(1)(A) of the Act.[9]

[9] See *N.L.R.B. v. Marine Workers,* 391 U.S. 418 and other decisions reviewed at p. 12, *supra.* An employee who joins a labor organization does not waive his statutory rights. A union, in its member-

In any event, it is clear that membership is not truly voluntary here. Under the prevailing collective bargaining agreement the employee must either join the union or pay a service fee to the union equal to dues. As pointed out in the dissenting opinion of Board member Leedom, an employee is faced with the practical problem that he must join the union in order to have any voice in the services for which he must pay. (A. 140, n. 19)

Where a union security agreement is in effect which requires payment of dues or dues equivalent, membership may never be said to be truly voluntary. 115 Pa. L. Rev. 47, 62-63; 80 Harv. L. Rev. 683, 685-687; 76 Yale L. J. 563, 565-567. Even where there is no union security agreement, the fact that a union may become the bargaining representative for an employee against his wishes puts a great practical pressure upon the employee to join the union in order to have a voice in his own terms and conditions of employment. See Cox, *Union Democracy,* 72 Harv. L. Rev. 609, 612.

The fact that the Petitioners were members of the union in no way diminishes their statutory rights. The fact of membership does not of itself justify applying the *Allis-Chalmers* doctrine here.

Unlike the *Allis-Chalmers* case, we are not here concerned with a traditional and central union activity, such as the strike, which was given firm and explicit protection under the Act. Rather we here see a union activity which has never found favor with the Board or the courts and

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ship agreement may not require the waiver of statutory rights any more than an employer could do so in an employment agreement. The membership relationship is subordinate to the statutory right of the employee to refrain from "any" concerted activity. See criticism of the waiver theory in 115 Pa. L. Rev. 47, 62-63, 66; 80 Harv. L. Rev. 683, 685-687.

which is not even protected by the Act. The policies underlying the *Allis-Chalmers* decision are not present here and the principle of that case, if it is sustained at all, should be limited to the particular facts of the strike situation.

IV. The Petition for Writ of Certiorari Was Timely.

The applicable statute provides as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."
>
> 28 U.S.C. 2101(c)

Under the statute the ninety-day period for applying for the writ of certiorari commences "after the entry of such judgment or decree". The decree of the Court of Appeals was entered April 16, 1968. (A. 167) The petition herein was filed within ninety days thereafter. The petition was timely.

Respondents' briefs in opposition argued that an order of the Circuit Court dated March 5, 1968 (A. 162) should be regarded as commencing the ninety day period under the statute. Such order was neither a judgment nor a decree but rather an order that a decree be entered at a subsequent time. The order was clearly intended to be tentative for it states:

> "... upon presentation, an appropriate decree *will be entered.*" (Emphasis supplied)

The order of March 5 is most nearly akin to an order directing judgment. Such an order is neither a judgment

nor a decree. As a general rule such an order does not even provide a basis for an appeal.[10] The order of March 5 did not constitute the entry of a judgment or decree within the meaning of the statute.

Rule 14(1) of the Court of Appeals established a procedure for the entry of a decree enforcing the order of an administrative agency.[11] That rule was applicable here. It is not relevant that the proceeding in the Court of Appeals was a petition for review rather than an enforcement proceeding as such. The effect of the action of the court was to enforce the order of the agency.[12]

It is clear that both the court and the parties were proceeding under the foregoing rule in preparing and entering the decree in this case. The order of March 5,

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[10] "In the absence of specific statutory authority, it has generally been held that an order for judgment, that is, an order directing the entry of a formal judgment, does not support an appeal." 73 ALR 2d 250, 296-297.

[11] The rule provides: "Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission, or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

[12] Section 10(f) of the National Labor Relations Act dealing with review proceedings authorizes the Court of Appeals "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board" the same as in the case of an application by the Board for enforcement of its order under Section 10(e).

See full text of the relevant statutes in the Appendix hereto.

1968 expressly directed the subsequent entry of a decree. It did not itself use the language appropriate to a judgment or decree. The existence of the order was not even communicated to the parties by the court or the clerk.

Subsequently counsel for the Board forwarded to the court a proposed decree. The covering letter on its face concedes that no decree had yet been entered. (A. 163) The clerk then transmitted the draft decree to counsel for the petitioners as contemplated by Rule 14(1). (A. 165) Thereafter under date of April 16 the clerk notified the parties that the final decree was "entered" by the court on April 16, 1968. (A. 167) The final decree of April 16 used language appropriate to a judgment and was formally signed by the three judge panel of the court. (A. 169)

Significantly, while it refers to the prior *opinion* of March 5, the decree does not even mention the prior *order*. Obviously the order of March 5 was neither a judgment nor a decree.

The statutory period runs from the date of "entry of such judgment or decree". The foregoing sequence of events can leave no doubts that that date was April 16, 1968.

A directly comparable authority is *Rubber Company v. Goodyear*, 73 U.S. (6 Wall.) 153. In that case the lower court had entered an order resolving the issues. A week later a final decree was filed and entered virtually duplicating the previous order. This Court held that the formal decree rather than the prior order governed the time for appeal.

The Court said:

"Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order set-

tling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." 73 U.S. (6 Wall.) at 155-156.[13]

The cases relied upon by the respondents are readily distinguishable. In both *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 and *U.S. v. Adams*, 383 U.S. 39 the petitions were found to be timely. Both cases involved a situation where the lower court had admittedly entered a judgment and the sole question presented was whether the failure to petition after such judgment precluded a petition subsequent to a revised judgment. Neither case involved the issue presented here; i.e., the determination of the date of entry of the original judgment or decree of the court.

In *Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952), a case also cited by respondents, the court of appeals entered a judgment reversing part III of three parts of a cease and desist order issued by the commission against Honeywell. After expiration of the period allowed for a petition for rehearing, the commission filed a memorandum calling attention

[13] See also *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22; *U.S. v. Gomez*, 68 U.S. (1 Wall.) 690; *Commissioner v. Estate of Bedford*, 325 U.S. 283; *U.S. v. Hark*, 320 U.S. 531; and *Wheeler v. Harris*, 80 U.S. (13 Wall.) 51.

to the court's failure to decree enforcement of parts I and II, for which the commission had cross-petitioned. The memorandum requested no alteration of the judgment relating to part III. Consequently, the court of appeals issued a decree enforcing parts I and II and reiterating the reversal of part III. More than 90 days after entry of the first judgment, the commission petitioned for certiorari to review the judgment reversing part III of its order. This Court held, with Mr. Justice Black and Mr. Justice Douglas dissenting, that the 90 day period allowed by 28 U.S.C. 2101 (c) began to run on the date of the first judgment.

That case has no relevance here. Unlike the present case, the judgment entered there was clearly intended to be a final judgment and it in fact used the word "adjudged." This judgment would have been the final action by the court but for the inadvertent failure to dispose of other uncontested portions of the case.

Here there was no such prior judgment. The March 5 order by its terms was tentative. It required presentation of a decree for entry. And only on April 16 was a judgment or decree first entered.

Department of Banking of Nebraska v. Pink, 317 U.S. 264, cited by respondents, is a case in which a state appellate court had taken final action and the sole issue was whether a slight subsequent modification which did not change the substance of the prior action would extend the applicable time limits.[14] By contrast here, the decree of

[14] That case also involved the issue of whether the time for seeking review in this Court should be measured from the final action of the state appellate court or whether the measuring date was the subsequent entry of judgment in the lower state court. The action by the appellate court was deemed controlling. *Cole v. Viollette*, 319 U.S. 581, is a similar case.

the Circuit Court was first entered within the meaning of the statute on April 16, 1968. No question of a subsequent modification is involved.

The new Federal Rules of Appellate Procedure which were effective July 1, 1968 substantially clarify and formalize the procedures in question here. Particularly pertinent will be Rule 36 which specifically defines the concept of entry of judgment.[15] Most important, both Rules 36 and 45 (c) require the clerk to notify each of the parties of the entry of a judgment thus eliminating the likelihood of ambiguity or unfairness in measuring time limits. Here the order of March 5 was not even communicated to the parties.

The issue of timeliness presented by the present petition is not likely to arise under the new rules. Thus there is no continuing policy to be served by questioning the procedures followed here. The obvious intention of the court below, confirmed by the actions of the clerk and the parties, to frame a decree for formal "entry" subsequent to the opinion date should be given controlling effect. It would be a manifest injustice to these petitioners if the timeliness of the present petition were to be denied upon the technical grounds advanced by the re-

[15] The rule provides:

Rule 36.

ENTRY OF JUDGMENT

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

spondents.[16] The petition herein was timely and should be considered on its merits.

V. Conclusion

The decree of the Court of Appeals denying the petition for review of the order of the Board dismissing the complaint against the union should be reversed with directions requiring the Board to enter an appropriate remedial order finding that the union has committed unfair labor practices under the Act.

Respectfully submitted,

JAMES URDAN,
Attorney for Petitioners

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[16] On May 22, 1968, within ninety days of March 5, 1968, the date claimed by the respondents to be the measuring date, petitioners filed with this Court an application for an extension of time within which to file a petition for a writ of certiorari. Such application clearly disclosed that the petitioners considered July 15, 1968 to be the then time limit and the application sought an extension to September 1, 1968. At that time neither respondent raised an issue as to the time limit. The application for extension of time was denied. Petitioners submit that if the issue had been raised at that time different considerations would have governed the decision of the Court with respect to the application for extension of time. Moreover the timing of the filing of the petition here caused no delay in fact since in either case the petition would have been considered and acted upon during the recess of the Court, with decision possible no earlier than the actual decision date here, October 14. To suggest that this totally immaterial delay should defeat the petition seems ludicrous in the light of the extraordinary delays at prior stages of the proceedings. The relevant docket entries disclose that the Board proceedings required three years to the day and the case was pending in the Court of Appeals for the extraordinary period of nearly four years. (A. 1)

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §151, et seq.) in addition to those set forth *supra,* p. 2, are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest,

by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

"REPRESENTATIVES AND ELECTIONS:

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * *

"SEC. 10. (e) The Board shall have power to petition any court of appeals of the United States, or if all the

courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its

judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

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